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May 15, 1997

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Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
Washington, D.C. 20554

Federal Communications Commission  
Office of Secretary

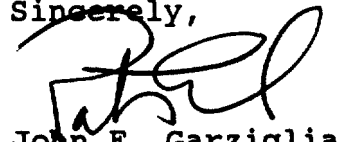
Re: Opposition to Metro Broadcasters-Texas, Inc.'s  
Motion for Leave to File Supplemental Comments  
concerning Amendment of Section 73.202(b),  
FM Table of Allotments  
MM Docket No. 97-26; RM-8968  
(Detroit, Texas)

Dear Mr. Caton:

Transmitted herewith on behalf of K95.5, Inc. is an original and four copies of its opposition to Metro Broadcasters-Texas, Inc.'s Motion for Leave to File Supplemental Comments concerning the above-referenced allotment proceeding.

Should any questions arise concerning this matter, please contact this office directly.

Sincerely,

  
John F. Garziglia  
Patricia M. Chuh

Enclosure

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

Federal Communications Commission  
Office of Secretary

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 97-26
Table of Allotments,	)	RM-8968
FM Broadcast Stations.	)	
(Detroit, Texas)	)	

To: Chief, Allocations Branch

**OPPOSITION TO MOTION FOR LEAVE TO  
FILE SUPPLEMENTAL COMMENTS**

K95.5, Inc., by its attorneys, hereby submits its opposition to Metro Broadcasters-Texas, Inc.'s ("Metro") Motion for Leave to File Supplemental Comments in the above-referenced proceeding ("Motion").<sup>1/</sup>

The NPRM in the above-referenced allotment proceeding established March 17, 1997 as the deadline for interested parties to file comments and April 1, 1997 as the deadline for filing reply comments. Metro, licensee of KHYI(FM), Howe, Texas filed its comments and counterproposal on March 17, 1997.<sup>2/</sup> In its

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<sup>1/</sup> The Commission instituted the above-referenced proceeding as a result of a petition for rule making filed by Great Plains Radiocasting requesting the allotment of Channel 294C2 to Detroit, Texas to provide that community with its first local aural transmission service. On January 24, 1997, the Commission released a Notice of Proposed Rule Making ("NPRM") seeking comment on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. Pursuant to the NPRM, on March 17, 1997, K95.5, Inc. ("K95.5") timely filed its counterproposal alternatively seeking the allotment of Channel 294C2 to Antlers, Oklahoma as that community's first local aural transmission service.

<sup>2/</sup> On April 1, 1997, Metro filed its reply comments in response to the Counterproposal filed by K95.5 on March 17, 1997.

counterproposal, Metro proposed to (1) allot Channel 238C2, 238C3, or 238A to Detroit, Texas, (2) substitute Channel 294C2 for Channel 238C2 at Hugo, Oklahoma, and (3) modify the license of KHYI to specify operation on Channel 237C2 instead of Channel 237C3. However, Metro's counterproposal did not contain a reimbursement statement concerning the substitution of Channel 294C2 for 238C2 at Hugo, Oklahoma. K95.5, Inc. currently operates FM station KITX on Channel 238C2 at Hugo, Oklahoma. On May 2, 1997, one month after the deadline set out by the NPRM for filing comments (and counterproposals), Metro filed its Motion for Leave to File Supplemental Comments and its Supplement Comments in the above-referenced allotment proceeding. Because Metro's counterproposal is fatally deficient and counterproponents are not allowed to cure defective counterproposals, the Commission should deny Metro's Motion for Leave to File Supplemental Comments and dismiss Metro's counterproposal.

It has been long settled that the Commission mandates "counterproposals to be technically and procedurally correct at the time they are filed (emphasis added)." See e.g., Warsaw, Missouri, 11 FCC Rcd 6372, para. 5 (1996); Naples, Florida, 10 FCC Rcd 6548, para. 9 (1995); Fort Bragg, California, 6 FCC Rcd 5817, note 2 (1991). In addition the Commission requires that where, as here, the allotment proposed in the counterproposal requires an existing station to modify its operation by specifying a new channel, the affected licensee/permittee must be reimbursed. See e.g., Circleville, Ohio, 8 FCC 2d 159 (1967); Punxsutawney, Pennsylvania, 3 FCC Rcd 5555, para. 9 (1988).

Interested parties filing counterproposals that require an existing station to change channels, therefore, must state their intention to reimburse the affected parties. See e.g., Punxsutawney, Pennsylvania, 3 FCC Rcd 5555 at para. 9; Naples, Florida, 10 FCC Rcd 6548 at para. 9 ("reimbursement pledge is a fundamental component of any counterproposal and must be present....") (emphasis added). However, Metro did not state its intention to reimburse K95.5, Inc. for the reasonable and prudent costs involved in changing its frequency from 238C2 to 294C2. If the counterproposal does not contain a reimbursement statement, the counterproposal is deficient and must be dismissed. See e.g., Fort Bragg, California, 6 FCC Rcd 5817 at note 2 (technically and procedurally deficient counterproposal not placed on public notice and rejected); Naples, Florida, 10 FCC Rcd 6548 at para. 9 (counterproposal dismissed for failure to make a reimbursement commitment in the counterproposal). Similarly, Metro's failure to include such a reimbursement statement makes Metro's counterproposal fatally deficient and the Commission should deny Metro's Motion for Leave to File Supplemental Comments and dismiss Metro's counterproposal.

Further, in the instant case, Metro seeks to amend its counterproposal one month after the comment (and counterproposal) deadline established by the NPRM. Although Metro now portends to "clarify that it will reimburse the licensee of Station KITX(FM), Hugo, Oklahoma for its reasonable and prudent costs associated with implementing the requested frequency change," Metro is actually seeking to cure its fatally deficient counterproposal.

Motion at 1. However, Commission precedent does not allow curative amendments to be filed in allotment proceedings, particularly when another counterproponent who timely filed its counterproposal would be prejudiced. See e.g., Amor Family Broadcasting Group v. FCC, 918 F.2d 960 (D.C. Cir. 1990); Charlotte Amalie, Virgin Islands, 12 FCC Rcd 2406, note 3 (1997). Here, K95.5, Inc. timely filed its counterproposal to allot Channel 294C2 to Antlers, Oklahoma. Metro's counterproposal did not contain the requisite reimbursement statement. To allow Metro now to cure its deficient counterproposal would prejudice a counterproponent who timely filed its counterproposal. K95.5, Inc. would be greatly prejudiced by having to modify its existing operation of FM station KITX on Channel 238C2 at Hugo, Oklahoma as a result of a fatally defective counterproposal. This should not be countenanced. Therefore, the Commission should deny Metro's Motion for Leave to File Supplemental Comments and dismiss Metro's counterproposal for lack of the requisite reimbursement statement.

Respectfully submitted,

K95.5, INC.

By: 

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Patricia M. Chuh  
Its Attorneys

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May 15, 1997

**CERTIFICATE OF SERVICE**

I, Lisa A. Skoritoski, a secretary in the law firm of Pepper & Corazzini, L.L.P., do hereby certify that on this 15th day of May, 1997, copies of the foregoing Opposition to Motion for Leave to File Supplemental Comments were mailed, postage prepaid, to the following:

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Lisa A. Skoritoski

\* Via Hand Delivery